No. 87-760

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In the Supreme Court of the
United States

October Term, 1987

DONALD L. KONG; MAY S. KONG

Petitioners,

vs.

HAWAIIAN MARINE LINES, INC., a
Delaware corporation;
WILLAMETTE IRON AND STEEL COMPANY;
GUY F. ATKINSON COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WALTER S. KIRIMITSU
HENRY N. KITAMURA
333 Queen Street, Suite 900
Honolulu, Hawaii 96813
(808)524-5803
Counsel for Petitioners

Of Counsel:

SHIM, TAM, KIRIMITSU,
KITAMURA & CHANG

October 21, 1987

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals erred in holding that a vessel owner who turned over improperly maintained equipment to the stevedore would be liable to the injured longshoreman only if it was foreseeable that the dangerous condition would not be remedied by the longshoreman and that the longshoreman would continue to work despite the dangerous situation.

2. Whether the Ninth Circuit Court of Appeals erred in holding that there was no reason for a repairman to foresee that a longshoreman would endanger himself by climbing to the top of the 16 foot barge door to untangle the door cables, thereby placing himself in danger of falling if the turnbuckle disengaged itself from the cable.

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Petitioners Donald L. Kong and May S. Kong respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit entered in these proceedings on July 23, 1987.

OPINIONS BELOW

Petitioners filed an amended complaint against Respondents Hawaiian Marine Lines, Inc. (hereinafter referred to as "HML"), Willamette Iron and Steel Company and Guy F. Atkinson Company (hereinafter collectively referred to as "WISCO"), to recover damages for injuries received by Petitioner Donald L. Kong (hereinafter referred to as "Plaintiff") when he fell from the top of the barge door while attempting to untangle the cables used to open and close the barge doors. The Honorable Charles L. Hardy, visiting Judge for the United States District Court for the District of Hawaii, granted WISCO's Motion to Dismiss under the "accepted work" doctrine. The District Court also held, in its unpublished Findings of Fact and Conclusions of Law, that HML was not

negligent because the barge was in a condition that the longshoreman could carry out the cargo operations in reasonable safety, and HML could not foresee that the end of the cable had unscrewed from the turnbuckle and that there was no locking wire to prevent the cable from separating from the turnbuckle. Plaintiff, thereafter, made a timely appeal to the Ninth Circuit Court of Appeals.

On July 23, 1987 the Ninth Circuit Court, by an unpublished Memorandum Opinion, affirmed the Order and Judgment of the District Court. The Ninth Circuit Court held that although the District Court erred in adopting the "accepted work" doctrine, it correctly dismissed the claim against WISCO because WISCO could not have foreseen that Plaintiff would climb up the barge door and attempt

to untangle the cables, and thereby fall and injure himself when the turnbuckle separated from the cable. The Ninth Circuit Court further held that HML was not liable because it could not reasonably foresee that manually untangling the cables would cause the cable to separate from the turnbuckle, thereby allowing the cable to disengage itself from its stationary position and causing injury to Plaintiff.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on July 23, 1987. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

The claims filed in this case were made under the authority of the Longshore and Harbor Worker's Compensation Act, as set forth in 33 U.S.C. § 905(b). Said section 905(b) provides:

> "In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or

against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter."

STATEMENT OF THE CASE

Plaintiff was employed by a stevedoring company as supervisor for the loading and unloading of vessels. On the date of the accident, December 24, 1980, Plaintiff was assigned to supervise the loading of the barge called "Oahu", which was owned by HML. The doors of the barge refused to close because the cables at the top of the doors, which opened and closed the doors, were jammed. Plaintiff climbed to the top of the doors, which were approximately sixteen (16) feet high, to untangle the jammed cables by shaking the same. As Plaintiff shook the

cable the cable came loose from the starboard turnbuckle and caused Plaintiff to lose his balance and fall to the deck of the barge. The cable and turnbuckle were examined after the accident and it was found that the turnbuckle had separated from the cable because there was no locking wire on the turnbuckle to prevent the turnbuckle from separating from the cable. (App. A, pgs. A-1--A-12; App. C, pgs. A-78--A-79).

The doors on the barge were designed to be opened and closed by a manual winch. Prior to the accident, HML taught the longshoremen to open and close the barge doors by the use of a forklift because such method was fifteen (15) minutes faster than the manual winch method. It was to the benefit of HML to finish the job faster because it paid for the cost of loading the barge by the

longshoremen. (App. C, pgs. A-39--A-42, A-51--A-54, A-64--A-67, A-81--A-86). The forklift method, however, made the cable at the top of the barge doors to slack and this caused the cable to jam unless the slack was picked up by the manual winches. On the day of the accident, the wheel to turn the manual winches could not be found. (App. C, pgs. A-42--A-45, A-47--A-51, A-62--A-64, A-67--A-71).

Prior to the accident, HML knew that the cable lines could be tangled when the forklift method was used to close the barge doors because on two occasions the operations manager of HML, Marlin Pulliam, climbed the barge doors to untangle the jammed cables. (App. A, pgs. A-1--A-8). Also, Pulliam's substitute, Frank Yuen, knew that the cable lines had jammed on several occasions, prior to the accident, when the forklift method was

used. (App. C, pgs. A-104--A-107). Since HML owned and controlled the equipment that opened and closed the barge doors, it had the duty to see that the equipment was properly maintained and in good working order. (App. C, pgs. A-99--A-102).

Pulliam, as manager of HML, was responsible for the inspection, maintenance and repair of the barge and its equipment. Each time the barge docked in Honolulu, Pulliam visually inspected the equipment on the barge - the winches, cables, eyebolts and turnbuckles on the cables and he made sure that the threads inside the barrel of the turnbuckle were secured to the cables so that the turnbuckle would not separate from the cable. But when the barge Oahu docked in Honolulu when the accident occurred, on December 22-24,

1980, Pulliam was on vacation in Portland, Oregon. (App. C, pgs. A-56--A-64, A-71--A-76, A-86--A-91). His replacement, Frank Yuen, was a sales representative and he was not familiar with the barge equipment and had no training on the inspection and maintenance of the equipment. While the barge was in Honolulu on December 22-24, 1980, Yuen did not do any inspection or maintenance work on the barge cables or turnbuckles attached to the cables. (App. C, pgs. A-93--A-104).

According to Bruce Wong, HML's expert, it was an industry standard to secure the turnbuckle with lock wires so that the turnbuckle would not become detached from the cable. Mr. Wong indicated that a turnbuckle would be improperly assembled if it was not equipped with lock wires. (App. C, pgs.

A-45--A47, A-115--A-118).

Prior to the accident, in October 1980, the cables and turnbuckles on the barge Oahu were replaced by WISCO in Portland, Oregon. After the cables and turnbuckles were replaced the barge was put back into service and transported cargo, in November and December 1980, between Portland and Hawaii. Immediately after the barge was repaired, the barge went to a port in Portland to pick up cargo destined for Hawaii. While the barge was being loaded John Lanagan, cargo supervisor for HML in charge of loading the barge, did not see any lock wires on the cables and turnbuckles. (App. C, pgs. A-108--A-113).

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISION OF THIS COURT.

A. The Ninth Circuit's Decision Misinterpreted This Court's Holding in Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed2d 1 (1981)

Both the District Court and the Ninth Circuit held that HML was not negligent and responsible for Plaintiff's injuries because it could not reasonably forsee that the cable would unscrew from the turnbuckle and that there would be no locking wire to prevent the turnbuckle from separating from the cable. This

misapprehends the facts. There is a conflict existing between the decision of the Supreme Court and the Ninth Circuit which merits resolution by the Supreme Court.

In Scindia, supra, Plaintiff De Los Santos was injured while he was working as a longshoreman aboard a vessel owned by the Defendant Scindia Steam Navigation Co. Plaintiff, while in the ship's hold, was struck by sacks that fell from a pallet which was held in suspension by a malfunctioning winch. The winch's braking mechanism had been malfunctioning for two days prior to the day of the accident. The district court granted summary judgment for the shipowner and the appeals court reversed. This Court, in affirming the appeals court, held that a vessel owner owed the following duties to a longshoreman: (1) Before the

stevedoring operations began, the shipowner had to see to it that the ship and its equipment were in such condition that a stevedore would be able to carry on the cargo operations with reasonable safety, and to at least warn the stevedore of any hidden defects in the equipment that were known to the shipowner or should have been known to him; and (2) After the cargo operations began, the vessel owner owed a duty to the longshoreman to act where danger to the longshoreman arose from a defect in the equipment if the owner: (a) had knowledge of the defect [owner chargeable with knowledge where equipment is defective from the outset]; (b) knew that the longshoreman would continue to work despite the existence of the defect; and (c) would not reasonably expect the longshoreman to remedy the situation. In

expressing its opinion on the vessel owner's duty before the cargo operations began, this Court said:

> "the vessel owes to the stevedore and his longshoremen employees the duty of exercising due care 'under the circumstances.' This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work. 394 U.S., at 416, n. 18, 89 S.Ct., at 417. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to a

longshoreman."

(101 S.Ct. at pgs. 1621, 1622)
(Emphasis added)

With regard to the shipowner's duty after the stevedoring operations began, this Court said:

> "we agree that there are circumstances in which the shipowner has a duty to act where the danger to longshoremen arises from the malfunctioning of the ship's gear being used in the cargo operations.
>
> On the facts posited here, for two days prior to the accident, it had been apparent to those working with the winch that this equipment was malfunctioning. Even so, whether it could be safely used or whether it posed an unreasonable risk of harm to Santos or other longshoremen was a matter of judgment committed to the stevedore in the first instance. The malfunctioning being obvious and Seattle having continued to use it, Scindia submits that if it was aware of the condition or was charged with knowledge of it, it was nevertheless entitled to assume that Seattle, the specialist in loading and unloading, considered the equipment reasonably safe and was entitled to rely on that judgment.
>
> Yet it is quite possible, it seems to us, that Seattle's judgment in this respect was so obviously improvident that Scindia, if it knew of the defect and that Seattle was

> continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and repair the ship's winch. The same would be true if the defect existed from the outset and Scindia must be deemed to have been aware of is condition.
>
> (101 S. Ct. at pg. 1626)
> (Emphasis added)

It is clear, therefrom, that a shipowner would be liable to an injured longshoreman if the injury was proximately caused by an equipment that was defective from the outset of the cargo operations. It is equally clear that a vessel owner would also be liable, after the cargo operations began, if he was aware of the defective equipment, knew that the longshoreman would continue to operate the defective equipment, and could not reasonably expect the longshoreman to correct the defect. And the vessel owner would be deemed to have

knowledge of the defective condition if it existed from the outset.

The decision of the Ninth Circuit, and that of the District Court, holding that HML could not reasonably foresee the unscrewing of the turnbuckle and the absence of the locking wire is contrary to the recognition by the Supreme Court that a vessel owner is responsible for any injuries caused by equipment that was defective from the start of the stevedoring operations.

It is the responsibility of the shipowner, where he supplies equipment to the stevedore, to inspect the equipment for safety before turning it over for use by the stevedore. Hedrick v. Daiko Shoji Co., Ltd., Osaka, 715 F.2d 1355 (9th Cir. 1983). It is undisputed that HML was the owner of the barge and its equipment. As such, HML had the duty to see that the

proper equipment was supplied to the stevedore, including the winch to pick up the slack in the cable, and to inspect the equipment for safety. This was the responsibility of Marlin Pulliam, HML's operations manager, who usually inspected the barge's cables to see that the threads inside the barrel of the turnbuckle were secured to the cables. On the date of the accident, however, the cables were not inspected before the barge was turned over to the stevedore since Pulliam was on vacation. Also, the winch could not be found. An inspection would have revealed a defect in the equipment in that there was an absence of lock wires and the threads inside the barrel of the turnbuckles were at its end and ready to be separated from the cable. The inspection would also have discovered that the winch to pick up the

slack in the cable was missing. The Ninth Circuit's failure to acknowledge that turning over defective equipment to the stevedore for cargo operations is a breach of duty by the shipowner, is contrary to the Supreme Court's edict in Scindia, supra.

B. Knowledge of Defect Implied Where Defect Existed From Outset.

As indicated heretofore this Honorable Court has determined in Scindia that a shipowner may still be liable to the longshoreman after the cargo operations has begun where the vessel owner has knowledge of the defect, knows that the longshoreman would continue to work despite the defect and that the longshoreman could not be expected to correct the situation. The Ninth Circuit's holding that HML could not reasonably foresee that the manual

untangling of the cables would cause the turnbuckle and cable to separate, is in conflict with the decision of this Court in Scindia. The Ninth Circuit's decision is erroneous because where the defect in the equipment exists from the beginning, the vessel owner is deemed to have knowledge of the defective equipment. Here, HML failed to properly inspect and maintain the equipment to see that the lock wires, turnbuckles and cables were properly secured before they were turned over to the longshoreman. HML also failed in its duty to see that the winch to pick up the slack in the cables was available to the stevedore when the cargo operations began. Thus, HML is deemed to have knowledge of the equipment defect. HML also knew that the longshoreman would continue to work despite the defect because on two prior occasions when the

cables jammed HML's manager, Marlin Pulliam, untangled the cables and the longshoreman continued to work. And the defect in the equipment could not be expected to be remedied by the longshoreman because the absence of lock wires and the unthreading of the turnbuckle were not easily detectable by the longshoreman. The lock wires and the turnbuckle were on top of the barge doors, which were approximately 16 feet high, and were not visible to the longshoreman.

The effect of this decision reaches far beyond one isolated incident involving a longshoreman aboard a vessel. Effectively, the Ninth Circuit has ignored the decision of this Court which requires vessel owners to supply stevedores with equipment that is in proper working order. The decision of

the Ninth Circuit raises serious questions concerning future cases involving defective equipment supplied to stevedores at the outset of cargo operations.

II. FORESEEABILITY OF PRECISE INJURY NOT NECESSARY FOR LIABILITY.

The Ninth Circuit's decision in dismissing the claim against WISCO was contrary to the holding of this Court in Munsey v. Webb, 231 U.S. 150, 34 S.Ct. 44, 58 L.Ed 162 (1913). The decision of the Ninth Circuit, in dismissing the claim against WISCO, was based on the ground that WISCO could not have foreseen a workman climbing the barge door to untangle the cable and falling therefrom when the turnbuckle separated from the cable. It is not necessary that one charged with negligence must have

anticipated the precise injury sustained by the claimant - it is sufficient that the wrongdoer should have foreseen that the negligent conduct would result in injury to someone. As was stated by this Court in Munsey, "it was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye." (231 U.S. at pg. 156). Similarly, in Virginian Ry. Co. v. Viars, 193 F.2d 547 (4th Cir. 1952) the Fourth Circuit, citing Munsey, stated:

> "...it is no defense to argue that defendant could not foresee the particular use to which the dynamite was put in this instance. As stated in 38 Am.Jur. 671: 'It is not a necessary element of negligence that one charged therewith should have been able to anticipate the precise injury sustained. To render one liable for negligence, it is sufficient that he should have foreseen that the negligence would

> probably result in injury of some kind to some person, and he need not have foreseen the particular consequence or injury that resulted.' See also, Munsey v. Webb, 231 U.S. 150, 34 S.Ct. 44, 58 L.Ed. 162;"
>
> (193 F.2d at pg. 550)

WISCO's act in not providing lock wires to secure the turnbuckle to the cables when it repaired the barge was sufficient to charge WISCO with negligence because it was foreseeable that such act would cause injury to someone. If was not necessary that WISCO foresee the precise injury sustained by the Plaintiff to hold it liable - a contrary decision would be in conflict with the holding of this Court in Munsey, supra.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a writ of certiorari be granted to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

DATED: October 16, 1987

Respectfully submitted,

/s/ Henry N. Kitamura

WALTER S. KIRIMITSU
HENRY N. KITAMURA

SHIM, TAM, KIRIMITSU, KITAMURA
& CHANG
333 Queen Street, Suite 900
Honolulu, Hawaii 96813
(808)524-5803

Counsel for Petitioners

APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

FINDINGS OF FACT, CONCLUSIONS

OF LAW AND ORDER FOR JUDGMENT

[Filed June 10, 1986]

This is an action for personal injuries arising under the Longshoremen's and Habor Workers' Compensation Act, 33 U.S.C. § 905(b). After trial to the Court, the case was taken under advisement. The statement of facts herein shall be deemed the Court's findings of fact and the discussion herein shall be deemed the Court's conclusions of law required by Rule 52(a) of the Federal Rules of Civil Procedure. Judgment will be entered in favor of defendant.

STATEMENT OF FACTS

At all relevant times the defendant Hawaiian Marine Lines, Inc. ("HML") operated a fleet of barges carrying cargo between Hawaii and the mainland. Its cargos were loaded and unloaded in Hawaii by Castle & Cook Terminals ("Castle"), a

stevedore company, pursuant to a written contract which, among other things, required Castle to "perform one (1) opening and closing of the vessel's cargo house doors." The plaintiff Donald L. Kong was employed by Castle as a supervisor. He supervised a crew of longshoremen during the loading or unloading of vessels.

The barge OAHU was one of HML's barges. Access to its cargo house was through two doors mounted on a track so that they were opened by sliding them apart and closed by sliding them together. The doors were opened and closed by a cable system consisting of three one-half inch galvanized steel cables, two winches, three pulleys, two gussets and two turnbuckles. To one facing the doors, the winches were mounted about three feet up on a

stanchion to the left of the doors. Two pulleys were mounted to the left of the doors and above the winches. The third pulley was mounted on a stanchion above and to the right of the doors. A gusset was attached to the top of each door a few feet from the center of the entrance to the cargo house. A turnbuckle was attached to the right side of each gusset.

A turnbuckle consists of a barrel into which are inserted two pins. One pin has left-handed threads and the other right-handed threads. There is a clevis at the end of each pin. One end of the follower cable was attached to the port turnbuckle, and the other end was attached to the starboard turnbuckle. A locking wire was inserted through a hole at the end of each pin and wrapped around the barrel to prevent the barrel from turning.

One of the winches was used to open the doors by winding a cable attached to the port gusset. The other winch was used to close the doors by winding a cable attached to the starboard gusset. Opening the starboard door and closing the port door were effected by a follower cable. As the port door opened, the follower cable would simultaneously pull the starboard door open. As the starboard door closed, the follower cable would simultaneously pull the port door shut.

The function of the turnbuckles was to keep the follower cable under tension so that both doors would simultaneously open or close to the same extent. If the pin holding an end of the follower cable were to unscrew, the resulting slack in the cable would prevent the starboard door from completely opening, and the

port door from completely closing. Turnbuckles are also used to keep tight lashings of cargo. These are necessarily adjusted every time cargo is lashed down. However, turnbuckles for opening and closing cargo house doors are not inspected on a routine basis. A failure of the doors to come together on closing will signal a need for adjustment of the turnbuckles to obtain the proper tension.

Both of the winches were operated manually. One hand wheel was provided for turning the two winches. Opening and closing the doors were long, laborious operations.

At some time in the past, a practice had developed of using a forklift to push the doors shut or pull them open. This practice was followed in both Honolulu and Portland. By using a forklift, opening and closing the doors of the

cargo house could be done more quickly and less laboriously than by using the winches. It was necessary to have someone wind the appropriate winch to take up the slack in the appropriate cable whenever a forklift was being used to open or close the doors. When using the forklift, the port door was required to be pushed open first and the starboard door was required to be pulled closed first, otherwise slack in the follower cable could not be taken up by the winches.

So long as a forklift opened and closed the cargo house doors in the proper order and the winches took up any slack in the cables, there was no unreasonable risk of injury.

On two occasions before December 24, 1980, while a forklift was being used to open or close the cargo doors, the cables

became entangled. On each occasion Martin Pulliam, HML's operations manager, climbed the batten boards to untangle the cables.

In October of 1980, the barge OAHU was sent to Willamette Iron and Steel Company ("WISCO") in Portland, Oregon, for repair and overhauling. The work included the installation of new opening and closing cables. Replacement of the follower cable was not required. After installing the new cable, WISCO adjusted both turnbuckles to establish the proper tension on the follower cables, lubricated them and wrapped them in canvas to minimize corrosion.

After WISCO completed its work on the barge OAHU, it transported cargo from Portland to Honolulu, from Honolulu to Portland and from Portland to Honolulu, arriving on December 22, 1980. On

December 23, Castle longshoremen commenced loading barge OAHU with cargo destined for Portland.

During the night of December 23, 1980, Mr. Kong's crew completed the loading of another HML barge. They were then instructed to assist another crew in loading the barge OAHU. Loading of the barge OAHU was completed after midnight. The wheel to turn the winch to close the doors could not be located. A cable was attached to the port door of the barge's cargo house and to the forklift, and the port door was pulled shut causing the follower cable to slacken. Slack also developed in the port door's cable because it could not be picked up by turning the closing winch. The cable was then attached to the starboard door to pull it shut. Before the door could be completely shut, slack in at least one of

the cables caused it to become entangled with one or both of the other cables so that the starboard door would not close completely.

A longshoreman named Furtado climbed the batten boards on the port door to attempt to untangle the cables. He was unsuccessful and Mr. Kong climbed the batten boards on the starboard door to attempt to assist him. Mr. Kong seized the upper part of the follower cable by one hand and the lower part by the other. He tried to untangle the cables by a whipping motion. While he was doing so the follower cable came loose from the starboard turnbuckle causing him to lose his balance and fall on the forklift. As a result, Mr. Kong was seriously painfully and permanently injured.

During the course of the stevedoring operations on the night of December 23

and the early morning of December 24, the HML representative, Frank Yuen, was on the barge OAHU. When the door cables became entangled, none of the Castle personnel attempted to report it to Mr. Yuen or to any other HML person. Mr. Yuen became aware that there was a problem when he saw Mr. Kong fall.

Investigation revealed that the bolt holding the end of the follower cable at the starboard turnbuckle had unscrewed and separated from the turnbuckle. Separation occurred because there was no locking wire through the hole at the end of the pin and lashed to the barrel. While the follower cable was under tension, some unscrewing of the turnbuckle bolt could have been caused by vibration. The lubrication of the turnbuckle at Portland in November of 1980 would have caused the pins to be

more easily unscrewed. The torque resulting from Mr. Kong's attempting to untangle the cables by a whipping motion could have hastened the unscrewing.

No turnbuckle pin had ever before separated from a turnbuckle on a HML barge's cargo house door.

The Kongs sued HML alleging that Mr. Kong's injuries were proximately caused by the negligence of HML. After HML filed a third party complaint against WISCO, the Kongs joined WISCO as an additional party defendant. At the close of plaintiffs' case the Court granted a motion pursuant to Rule 41(b) of the Federal Rules of Civil Procedure to dismiss WISCO as a party defendant, but denied a motion to dismiss it as a third party defendant. Subsequently, the Court was informed that HML and WISCO had resolved the third party issues.

DISCUSSION

Prior to 1972, a longshoreman injured while loading or unloading a ship could receive compensation payments pursuant to the provisions of the Longshoreman's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950. He could also have judgment against the ship owner if the injury was caused by the ship's unseaworthiness or negligence. The Act was amended extensively in 1972. The longshoreman's right to recover for unseaworthiness was abolished. However, his right to recover from the ship owner for negligence was preserved by Section 905(b) of the amended Act. See Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156, 164-65, 101 S. Ct. 1614, 1620-21 (1981).

In Scindia the Supreme Court described the duties owed by a vessel to

a stevedore and his longshoremen employees:

1. To exercise "ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property," 451 U.S. at 167, 101 S.Ct. at 1622;

2. "To [warn] the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations, and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the

performance of his work." Id.

3. To exercise reasonable care to avoid injuring a longshoreman when a vessel actively involves itself if cargo operations. Id.

4. "To exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operations." Id.

A vessel's duty to the longshoremen does not require the ship owner to exercise reasonable care to discover dangerous conditions that develop within the stevedoring operations. Scindia, 451 U.S. at 172, 101 S.Ct. at 1624. However, if a ship owner knows that a stevedoring operation is being conducted in a manner that creates an unreasonable risk of harm to the longshoremen, the ship owner has a

duty to intervene. Id. at 175-76, 101 S.Ct. at 1626.

Applying the principles enunciated in Scindia to the facts in this case, the following conclusions can be drawn:

1. The barge OAHU was in such condition that the stevedore could have carried out its cargo operation with reasonable safety to its longshoremen.

2. HML did not know and in the exercise of reasonable care would not have known that the pin holding the end of the follower cable at the starboard turnbuckle had unscrewed and that there was no locking pin to prevent the bolt from separating from the turnbuckle.

3. HML did not know nor in the exercise of reasonable care should have known that the longshoremen would attempt to close the barge OAHU's cargo doors by (a) first pulling the port door shut and

(b) attempting to shut the doors with a forklift when the wheel to turn the closing winch could not be found.

4. HML (acting through Mr. Yuen) did not know the manner in which the stevedore was attempting to close the barge OAHU's cargo doors on December 24, 1980.

5. HML (acting through Mr. Yuen) did not know of the entanglement of the cables and of Mr. Kong's presence on the batten boards for the purpose of trying to entangle them until it was too late to intervene.

6. HML was not negligent.

ORDER

IT IS ORDERED that plaintiffs take nothing by their complaint and that judgment be entered in favor of the defendant Hawaiian Marine Lines, Inc.

DATED this 10th day of June, 1986.

/s/Charles L Hardy
CHARLES L. HARDY
Judge of the United
States District Court

cc: all counsel of record

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 86-2301

D.C. CV 82-0176-CLH

DONALD L. KONG; MAY S. KONG,

Plaintiffs-Appellants,

v.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation;

WILLAMETTE IRON AND STEEL COMPANY;

GUY F. ATKINSON COMPANY,

Defendants-Appellee.

MEMORANDUM *

[Filed July 23, 1987]

Before: GOODWIN, TANG and THOMPSON,

Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 21.

An injured longshoreman and his wife sued Hawaiian Marine as owner of the vessel upon which the industrial accident occurred, and Willamette Iron and Steel Company, as a firm that had repaired the vessel. The trial court found no third-party liability and dismissed the action against both defendants. The plaintiffs appeal, and we affirm.

Kong was injured when he fell from the top of a barge door and bounced off a forklift before hitting the steel deck. Kong had climbed up to the top of the door to untangle slack in wire rope that had accumulated as the doors were being pushed open by a forklift instead of being opened by a hand-turned windlass which was designed to pull the door open by means of winding in and paying out the wire rope.

The trial court determined that the

accident resulted from a sequence of events entirely within the control of the stevedore company, and essentially beyond the control of either the owner of the vessel or the repair firm which had recently replaced the cables in the door-opening mechanism. It was the plaintiffs' theory that the vessel was liable for the failure to provide a safe ship (one on which a cable would not give way while a workman was relying upon its remaining fast) and that the repairman was liable for placing in service a cable and turnbuckle that would be likely to work loose from its moorings while workmen were hanging onto it.

The trial court rejected these theories of legal duty owed by the vessel or its repairman to the workman. The court found as a fact that the shipowner was not negligent in failing to discover

that the turnbuckle that came loose had not been adequately secured. The court found that the repairman had done the work specified by the owner and that the owner had accepted the work. The court then apparently followed the largely discredited "accepted work" doctrine, which, at early common law, protected from third-party liability a contractor whose work had been accepted by an owner if the property or appliance under control of the owner turned out to be unsafe for workers or others using the property or appliance.

The district judge's reliance on the "accepted work" doctrine was in error. This doctrine was in good standing at the time of Winterbottom v. Wright, 10 M. & W. 109, 152 Eng. Rep. 402 (Ex. 1842), but has since been discredited. Modern industrial accident cases uniformly

either reject or severely limit the applicability of the "accepted work" doctrine. 58 A.L.R. 2d 865, 873 (1958) (discussing contractor liability to third persons). More important, for we apply substantive admiralty law in this case, the Fourth Circuit has specifically rejected the "accepted work" doctrine under general maritime law. Whorton v. T. A. Loving & Co., 344 F.2d 739 (4th Cir. 1965).

Notwithstanding the error in adopting the so-called "accepted work" doctrine, the trial court correctly dismissed the claim against the repairman. There is no evidence in the record that would justify a finding that any reasonable repairman would have foreseen that workmen would place themselves in a position to be injured if the turnbuckle should work loose from the "following" cable

installed to help pull the barge door open. The only foreseeable and untoward consequence of the turnbuckle coming loose in the proper operation of the winches would be that the door would not open, if closed, or close, if opened. Because the method chosen by the longshoremen to open the door consisted in pushing with a lift truck rather than pulling with the hand-operated winches (except to take up slack) there was no foreseeable connection between the repairman's alleged installation of the defective turnbuckle and the injury that befell this workman. More to the point, there was no reason for the repairman to foresee that any workman would climb up the door and use the cable for a handhold while shaking out slack caused by opening the door with a lift truck. Accordingly, we hold that there was no error in

releasing Willamette Iron and Steel Company from liability, even though the court articulated the wrong reason for doing so.

The appellants' theory of the shipowner's liability is based on the owner's duty to provide to a stevedore crew a ship that is reasonably safe for the intended stowage or discharge of cargo and free from hidden defects likely to cause injury to the longshoremen. The vessel turned out to have a hidden defect which did in fact produce an injury. Nonetheless, the district court ruled that the shipowner was free from fault.

The vessel's bargehouse doors were designed to be opened and closed by means of winch mechanisms. One winch was designed to open the doors by winding the "open cable" attached to the port gusset so as to pull the port door to the

portside and simultaneosly pull on the follower cable thereby forcing the starboard door to slide open to the starboard side. The other winch was designed to close the doors by winding the "close cable" attached to the starboard gusset theréby sliding the starboard door to the portside. This action created a tension on the open cable so that the port door would close to the starboard.

Several years prior to the accident, the vessel's owner became aware that longshoremen were opening the barge doors by means of forklifts. This process made the opening of the doors quicker and easier than the hand-cranked winch method. The forklift method, however, also made it necessary for the stevedore's employees to man the winches in order to take up the slack that

developed in the cables. When using the forklift method, it was essential that the port door be pushed open first and the starboard door be pushed closed first. In any other sequence, slack in the form of a loop would develop in the follower cable, and this slack could not be taken up by the winches. In such event, frequently the cables would jam and the doors could not be fully closed. On two occasions prior to the accident involving the vessel, longshoremen failed to take up the slack with the winches and the cables became entangled. Both times, a longshoreman was able to untangle the cables without injury or risk to anyone.

On the day of the accident, after the barge was fully loaded, the longshoremen began to push the barge doors closed with the forklift. The longshoremen could not locate the detachable wheel used to turn

the winch. They nonetheless began their operation by using the forklift on the port door. Slack developed in the port door's cable. Because the wheel for the winch had not been located, the slack was not taken up. The cables then became entangled and the doors would not close completely.

After one longshoreman had climbed to a point on the port door to attempt to untangle the cables and was unsuccessful, Kong climbed up the starboard door to assist in the untangling. Kong attempted to untangle the cables by whipping them with one hand while holding onto the follower cable with the other hand to brace himself. The cable came loose from the starboard turnbuckle causing him to lose his balance and fall.

Although the vessel's representative, Frank Yuen, was on the barge at this

time, none of the stevedore personnel reported the problems with the barge doors to Yuen or any other officer of the vessel. Yuen became aware of the situation only after he heard some commotion and saw Kong attempt to untangle the cables and then fall.

After the accident, an investigation revealed that the bolt holding the end of the follower cable to the starboard turnbuckle had unscrewed and separated from the turnbuckle. One cause for this separation was that there was no locking wire attaching the cable to the turnbuckle. The separation was apparently hastened both by normal vibration aboard the barge and as a result of the whipping motion Kong used in attempting to untangle the cables.

The primary responsibility for maintaining safe conditions on board a

vessel during cargo operations rests on the stevedore. Taylor v. Moram Agencies, 739 F.2d 1384, 1387 (9th Cir. 1984). A shipowner may also incur liability toward longshoremen employed by stevedores but only in circumstances where the shipowner has breached a duty to intervene or warn of a hazard. Such a duty may arise when the owner (1) has actual or constructive knowledge of a dangerous condition, (2) knows that the longshoremen are continuing to work despite the existence of an unreasonable risk of harm to them, and (3) could not reasonably expect that the stevedore would remedy the situation. Id. at 1388, citing Scindia Steam Navigation Co., v. De Los Santos, 451 U.S. 156, 175-76 (1981).

Appellants argue that by failing to discover or warn of the defect in the turnbuckle, the owner breached his duty

of care to longshoremen engaged in cargo operations aboard his vessel. To prevail on this theory, however, appellants must prove that three eventualities were foreseeable: (1) that the defect would not have been discovered and safely dealt with by the stevedore, (2) that the defect would have foreseeably resulted in injury arising out of the cargo operations, and (3) that the defect would have caused the type of injury suffered.

Appellants rely on Subingsubing v. Reardon Smith Line, Ltd., 682 F.2d 779 (9th Cir. 1982), and Turner v. Japan Lines, Ltd., 651 F.2d 1300 (9th Cir. 1981), cert. denied, 459 U.S. 967 (1982). In both cases, as in this case, a longshoreman was injured as a result of a hidden or nonobvious defect or condition. However, unlike this case, Subingsubing and Turner involve

conditions that reasonably and foreseeably could cause injury, and that would likely be encountered by the stevedore in the normal course of cargo operations.

In Subingsubing, a longshoreman died as a result of injuries sustained when he stepped on a "dead-eye," a small piece of wood used to stop the step of a rope ladder from moving. The court held that the duty of care enunciated in Scindia included "reasonable care to keep the deck clear of dangerous and nonobvious tripping hazards at the time that the longshoreworker comes on board." Subingsubing, 682 F.2d at 782. The conclusion that the piece of wood on the deck presented a "nonobvious tripping hazard" contains an implicit assumption that it was "reasonably foreseeable" or "likely" that someone could be injured by

tripping over a piece of wood lying on the deck.

In Turner, a longshoreman was injured when he was unloading plywood from the hold of the ship and a stack of plywood collapsed beneath him. The testimony revealed that the shoring had not been constructed properly and that a properly shored stack of plywood should not have collapsed under the weight of a longshoreman. The cargo had been loaded by a Japanese stevedore, and shored and lashed by another Japanese firm. The court held that "the vessel had a duty to protect the plaintiff against concealed dangers created by a foreign stevedore which the vessel could, in the exercise of reasonable care, have corrected or warned of." Turner, 651 F.2d at 1304. As in Subingsubing, it would be difficult to conclude that the improper shoring was

a "concealed danger" unless the court implicitly assumed that injury to a longshoreman was likely to occur or at least could be reasonably foreseen as a result of the defect in the shoring.

Appellants argue that the owner knew before the accident that opening and closing the barge doors with a forklift would create a hazardous condition. This contention is not established by the record. The district court found that "so long as a forklift opened and closed the cargo house doors in the proper order and the winches took up any slack in the cables, there was no unreasonable risk of injury." On this occasion, of course, a winch was not used to take up cable slack because the winch wheel was misplaced or lost. There is no record evidence, however, that the vessel owner was in any way responsible for not having the winch

wheel where the longshoremen could find it. In addition, the mere fact that on two prior occasions someone had found it necessary to climb the barge doors to untangle fouled cables is not a sufficient ground to hold the owner responsible for knowledge that the turnbuckle mechanism attached to the starboard follower cable was in a dangerous condition. The important fact is that from the perspective of the vessel owner, the stevedore's use of the forklift and winch method to open and close the cargo doors in the normal course of operations had proved to be safe and efficient.

Before the accident there were no known incidents where a bolt had ever disengaged from a turnbuckle on cables above the barge door. It would have been reasonable to expect that even if a bolt

holding an end of a follower cable were to unscrew from its turnbuckle, the cable would merely lose tension and lay on the door mechnisms without posing any risk to workmen. While unwanted slack in the cables could be expected to have prevented the doors from functioning completely, the owner of the vessel would have no reason to anticipate that a longshoreman would climb up the door, much less that he would attempt to hold onto the slackened cable for support.

In summary, the vessel's duty to warn arises only with respect to hazards that would be likely to be encountered by the stevedore in the course of normal cargo operations. In this case, it was not reasonably foreseeable that manually untangling the cables would cause the follower cable to disengage from the turnbuckle or that the separation of the

cable from the turnbuckle could cause injury of the kind appellant suffered here. Therefore, we have no basis for holding clearly erroneous the district court's factual determination that the owner was not negligent. The stevedore's negligence, of course, is not before us.

AFFIRMED

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME I OF VII VOLUMES

PAGES 1-156

DATE: May 22, 1986

Hawaiian Marine Line barges.

A Yes.

Q Now, on the other barges, what kind of winch system did they have to open and close the doors?

A They were open barges, strictly container barges, so there were no winches. The only two barges that had winches were the house barges, barge Oahu and the Malolo.

Q Malolo

A Yes

Q So the Malolo also had a cargo house, a deck house, and it had doors, right?

A Yes, similar to the Oahu.

Q And how did the winch system on the Malolo work?

A They were the same. Both barges manually opened.

Q Did any of them have an electric

winch system?

A None as far as I know.

Q Now, Mr. Tanaka, before Mr. Kong's accident, did you open and close the barge doors, or did you and your men open and close he barge doors on the Oahu before Mr. Kong's accident?

A Yes.

Q And could you tell us first how you used to open, well, let's say close the doors? How did you used to close the doors on the barge Oahu? Can you speak into that microphone?

A We were taught by Don Stiger and Marlin of HML. Actually, the opening and closing of the barges Malolo and Oahu was

their responsibility, and, as the years went by, they taught the longshoremen as well as the supervisors in charge of the

operation how to open and close the barges. To make it easier for the men, what they were doing was using a forklift on the deck to push and open the doors. That would save a lot of time. If we were to manually open the door here, it would take approximately, what you call, twenty-five to half an hour just to open the door or close the door. By using a forklift to pull the door open and push the door closed, while you're opening the door you pull it, and all the men do is take the slack on the cable. By doing this, you can open and close the door in approximately five minutes or less at times, you know, if we don't have any problems with the cables.

Q So you save approximately 15 to 20 minutes each way by using the forklift?

A Yes, sir, we did.

Q Now, you said you were taught by Don

Stiger and Marlin. Number one, who is Don Stiger?

A. Don Stiger, I would say at that time he was the operating manager, and Marlin was his assistant, you know.

Q Were they both from Hawaiian Marine Lines?

A Both of them, Hawaiian Marine Lines.

Q About how long before Mr. Kong's accident were you taught to do this?

A About two years.

Q These brackets that go up the door?

A Yes, those brackets there.

Q And did you have any men manning the winch to pick up any slack on the cable wire?

A Yes. George Chock had two men on the wince there, and then Joe Flores... .

THE COURT: Just a minute. Who had

the men on the winch?

THE WITNESS: George Chock is the gang foreman. He's in operations.

Q Mr. Tanaka, that night--I don't want to contradict you--but in your deposition did you not state that the wheel was absent or gone or nobody could man the winch?

A Oh, yes. When we tried to close it, George Chock being the foreman and Wesley Furtado--he mans the winches, you know, opening and closing up the winches--looked around for the wheel approximately two feet in diameter, and then he approached Kong and said, hey, they cannot find the wheel.

Q That's the detachable wheel.

A The wheel to close the doors.

Q Now, did they check to see if the wheel was in the bracket that you said which was the usual position of the wheel?

A Yes. That's the first place they looked, and they looked other places, and they couldn't find it at that time. Then

Donald Kong approached me, and I looked for myself and finally we found it on the barge but far away from where it should have been.

Q And this was after the accident already.

A Yes, after the accident.

Q Could you proceed and tell us, as you tried to close the doors with the forklift, what happened?

A When we tried to close the doors with the forklift, what happened was the cable on the top somehow got tangled, and Donald Kong, the operating supervisor at that time, was standing next to me and Wesley Furtado, George Chock, and the

forklift operator, what you call, Joe Flores at that time, operating Hyster 464; and, when the thing got tangled, Wesley Furtado climbed up on the right side of the door, I mean on the left side of the door to see what the problem was.

Q When you say the left side of the door, was that on the port door?

A When you're facing the door, looking at it from here, that's the port there, yes, on the left.

Q So Mr. Furtado went up on the port door to check to see what was wrong.

A Yes, he did.

Q And what about Mr. Kong?

A Then since Wesley, what you call, had problem up there trying to untangle that cable, Donald Kong, he climbed up also

THE COURT: Just a minute. I'll

sustain the objection.

MR. KIRIMITSU: Would you resume your seat again, Mr. Tanaka?

(Witness resumed the witness stand)

Q In your experience as a superintendent, Mr. Tanaka, have you come across what is called a locking or jam nut?

A All the turnbuckles that are used on these HML barges for lashing and unlashing have locking nuts on them.

Q Looking at this exemplar, is there any jam nut on it?

A On this particular turnbuckle, no, there is no jam nut on it.

Q Normally from your experience where would the jam nut be?

A The jam nut would be right on here. What it does is prevent this thing from unwinding by itself. After it takes so much tension on it, you'll tighten on

this jam nut, and that would prevent this from working itself loose. To further, what you call, prevent this from spinning, most of the turnbuckles have a hole that goes right through the turnbuckle, which we use a baling wire. That's a second thing to prevent this, what you call, nut here to spin also. By having the lock nut and the wire here, that would prevent the nut from spinning.

Q And what is that wire device called?

for a HML representative?

A George Chock told me he looked for one of the representatives at that time. Later on, as I recall, Donald Kong also did.

Q Were you able to find a representative of HML?

A When Donald approached me, he said

did you see any representative from HML, and I told him no; so, in turn, I also looked for myself.

Q Going to the detachable wheel that was usually or should have been on the bracket, you indicated that eventually you found the wheel, is that correct?

A Yes, we did.

Q About when did you find the wheel?

A After the door jammed.

Q And where did you find the wheel?

A It was hidden in between on of those brackets there.

Q Close to where it should have been, or whereabouts in relation to that door?

A It was on the starboard side.

Q On the opposite side.

A On the opposite side, yes.

Q You mentioned that it was hidden. How was it hidden? Why was it hidden?

A Somehow the barge has a strong

upright frame that holds the cargo from shifting, and that thing has an opening and

at times they would store some chain and loosened turnbuckles in there. It acts as a storage compartment, and somehow somebody stuck the wheel in the storage area there, which we didn't realize it was in there.

Q And that's not the usual place to store it.

A That's no place to put it because no one would expect it to be hidden in there.

A Mr. Tanaka, based upon your experience as stevedoring superintendent, when the doors like the barge doors got stuck that night and there are no HML personnel at the pier, what is your job? What do you do in that

situation?

A We try to give our customer the best service we can. We try to eliminate any standby time. If there is no HML representative at the time to assist us or instruct us how to open and close the door, we've been doing it for so long with the representative, and at times when they are not around we automatically close the door, because we don't want to be criticized just standing around there and waiting for a person to come around just to close the door. So we do it by ourselves and we were taught how to open and close the door.

Q About what time did Mr. Kong's accident happen?

A It has been two years. I don't recall. It was after lunch sometime.

Q Could it have been after midnight?

A When I say after lunch, it's after

midnight, because we

MR. NAGLE: Objection; immaterial.

THE COURT: Sustained.

MR. ESTES: No further questions.

MR. KIRIMITSU: No further questions, your Honor.

THE COURT: Mr. Tanaka, I want to ask you some questions.

THE WITNESS: Yes, your Honor.

THE COURT: Did anyone of Hawaiian Marine Lines tell you we want to use the forklift to open these doors to save some time?

THE WITNESS: Yes, not to save time but it would be much easier, they told us, to use the forklift, because prior to that... .

THE COURT: Just a minute now. Do you recall who told you to do that?

THE WITNESS: Marlin.

THE COURT: That's Mr. Pulliam.

THE WITNESS: Pulliam, yes.

THE COURT: Anyone else?

THE WITNESS: Prior to Marlin, it was John Stiger.

THE COURT: John Stiger?

THE WITNESS: Yes, John Stiger.

THE COURT: He was before Mr. Pulliam.

THE WITNESS: Yes.

THE COURT: Do you recall about when he told you

to use the forklift?

THE WITNESS: No, I don't recall.

THE COURT: Do you recall when Mr. Pulliam did?

THE WITNESS: It was prior to Donald's accident because we were reluctant about using a forklift because

of damaging the door, you know, by pushing, but I guess not because they told us to use the forklift. They requested for a forklift to push and open the doors, so from then on we started using the forklift.

THE COURT: When do longshoremen use the safety belts? Under what circumstances?

THE WITNESS: Mostly container operations, you Honor.

THE COURT: What do they hitch the belt to?

THE WITNESS: Most of the containers, like the Matson containers, they have safety rings, built-in safety rings, so we can hook the belts on.

THE COURT: To your knowledge, are forklifts used to open barges by any other shipowner than Hawaiian Marine?

THE WITNESS: Just HML, as I recall.

THE COURT: HML?

THE WITNESS: Hawaiian Marine Lines.

THE COURT: Just Hawaiian Marine Lines.

THE WITNESS: Yes, your Honor.

THE COURT: Anything else, Mr. Kirimitsu?

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME II OF VII VOLUMES

PAGES 157-306

DATE: May 23, 1986

A Operations manager.

Q And this would be operations manager for Hawaiian Marine Lines.

A Yes.

Q Can you tell us what were your duties as operations manager for Hawaiian Marine Lines in Honolulu?

A To hire a stevedore company to arrange for the delivery and receiving of cargo, husbandry for the tug as far as allocating fuel, groceries, making up stow plans for the barges, running down claims, terminal operations.

Q Did you have any duties relating to the bolts on the doors of the barges that would come into Honolulu?

A When the barges would come in, I would undog the bolts on the doors.

Q What do you mean by undog the bolts?

A Loosen them and take the bolts off.

Q And as operations manager was it also your responsibility to inspect the equipment on the barges?

A I would take a visual inspection.

Q I'm sorry. I couldn't hear you.

A A visual inspection of everything on the barge.

Q All right. Allow me to refer you to the date of the accident in this case with Mr. Kong which is December 24, 1980. Were you the operations manager for Hawaiian Marine Lines at that time?

center and you turn on the wheel and the door would open. When you close, you would put it on there, the wheel would close it if you turn it.

Q All right. You can resume your seat.

(Witness resumed the witness stand)

Q Now, on the particular system on the

barge Oahu with such things as the cable, the turnbuckle, the eye bolts, the gusset, the winches and the bolts, who performed the regular maintenance of those items?

A That was performed in Vancouver by Columbia Marine Lines.

Q And these would be some of the items that you would inspect when the barge would be in port in Honolulu.

A Yes. I visually inspected, yes.

A What are the batten boards on the door?

A The batten boards are the eight boards that's running horizontally on the face of the door.

Q And what were these boards used for?

A They are used to protect the door from the cargo that was loaded on the after deck.

Q Now, I'd like to get back to the area

of inspection. Can you tell us what you do as far as inspection from the time the barge would come into port to the time the barge left?

A I get on an assist tug at pier 21 and go out to the barge, and I pull n retrieving line, go down to the engine room

start the engine, and on the way in turn on all the lights on the barge, and on the way up forward I would go up one side and check the running lights and make sure they were functioning, open all the vents making sure that the vents were open, go up forward and start up the casting engine, and at that time the tug will be breaking its tow and I pull up the bridle chain and the pig tail.

Q Okay. Mr. Pulliam, I'm asking you as

far as inspection itself.

A Okay. I'm inspecting all this.

Q Okay.

A I'm inspecting the hard shackles and the insurance wire, and then I go down the other side and check the running lights and the vents, and then I usually go and undog the bolts on the door, go through the hatch and check the cargo and also the lashing on the cargo.

Q And as a matter of procedure, how often would inspections be made? Would it be on every voyage every time a barge came in?

A Yes.

Q Okay. Now, if you were on vacation and someone else was taking your place, was the procedure for whoever was in your position to do the inspection?

MR. JIM ON: Objection, your Honor. That's speculation.

THE COURT: He may answer it.

A I don't know.

Q Was there any procedure at Hawaiian Marine Lines that the barge was to be inspected each time it was to come in?

A No, not that I know of.

Q This is something that you did yourself.

A Yes.

Q And as far as the specific cables, turnbuckles and eye bolts, you would do this on every voyage.

A I would visually inspect it from the deck to see if they were still in place.

Q And that's every voyage

A Yes.

Q And during the period of time when the barge would be loading and unloading in Honolulu, would you also be inspecting those items at that time also during that

period of time?

A Once I inspected it on the first, I wouldn't have to.

Q When the doors were opening and closing, you were usually there.

A Yes.

Q And you would take a look and see how the cable system was working and see if everything was properly adjusted.

A Yes.

Q Before Donald Kong's accident, do you recall when the last time the Oahu was in Honolulu?

A The last time? Probably about 35 days prior to the accident.

Q And you would have made your inspection at that time.

A Yes.

Q Were you present when the Oahu came

in during the period of time of the accident?

A No.

Q Where were you at that time?

A I was in Portland, Oregon.

Q Now, you previously stated that at times the doors would jam. Can you come down to exhibit number 1 and show the Judge where the jams would usually take place?

A This cable here was either jammed underneath here or this one here would be jammed underneath here. There's a type of roller on the back side of this.

Q You're pointing to the port and starboard gussets, right?

A Right.

Q And would the jamming take place when a forklift was used to open and close the doors?

A Yes. When the forklift is opening

it, if no one is manning on the opening, if no one is manning this winch, the cable would slack and you would get this to come up and jam.

Q Where did the cable slack a couple of times when you saw it jammed?

A Right up in here on top of here and underneath here.

HML as operations manager, was that practice already taking place at that time?

A Yes.

Q And the times that you observed the forklift being used to open and close the doors, you had no objection to their using this particular method, is that right?

A No.

Q In fact, would you say that was the

preferred method?

MR. JIM ON: Objection, your Honor. I think that requires the witness to give an opinion. I think it's an improper question.

THE COURT: He can answer that.

A Can you repeat the question?

Q Yes. Was that the preferred method of opening and closing the doors as opposed to doing it manually?

A It was the... .

MR. JIM ON: Same objection, your Honor.

THE COURT: Overruled.

MR. JIM ON: The question is not clear as to whom it is referred.

THE COURT: You may answer.

A It was easier to do it that way.

Q And you had no objections to the people using that particular method.

A No.

Q In fact, wouldn't you say in your opinion it was a more practical way to do it?

A Yes.

Q Okay. It would save time.

A Yes.

Q And it would save manpower.

THE COURT: You're leading the witness now.

MR. NAGLE: Thank you, your Honor.

Q Would it save manpower?

A Yes.

Q During the majority of time you were the operations manager at Hawaiian Marine Lines, were the doors closed and opened by means of a forklift or by means of the manual winch?

A By forklift.

Q Now, you stated before that there were times when you would undog the

bolts. Would you tell us how you went about doing that?

A With an inch and an eighth wrench.

Q And some of the bolts were located at the top of the door of the Oahu, is that right?

MR. JIM ON: I would object to the leading questions.

THE COURT: Sustained.

Q Where were the bolts located on the door of the Oahu?

A Would you like me to step down here?

Q Sure.

A Usually one of the longshoremen.

Q When you say one of the longshoremen, you mean someone like Tanaka?

A I can't recall if he got it, but it's usually one of the longshoremen working there.

Q Now, with respect to opening the barge door, did you need that winch wheel to open that barge door?

A Come again, please.

Q To open the barge doors, after it is undogged, did you not need this winch wheel?

A Yes.

Q You needed the winch wheel because of what? Slack?

A To take up the slack.

Q If the winch wheel was not used to open the barge doors, and there was slack, what would happen?

A It would jam up.

Q If the winch wheel was not used and the wires were slack, would it also create problems for the forklift coming into and unloading the cargo?

A Yes, but the doors would be open and the wire would be hanging slack in the

middle of the doorway there and it would catch on to that, and they would have to move the wire and hang it out someplace and get it out of the way.

Q But what would happen? Usually they would need the winch wheel to take up the slack anyway, right?

A That's correct.

Q Now, there has been some testimony, if I may move on to another subject matter, about your inspection of the turnbuckles and the cable system. Specifically with respect to this door, you mentioned the word visual. I mean did you go on top of the barge house doors every time it came in and did you inspect it real close? Is that what you meant?

A No. I didn't climb up there to

inspect it. I took a visual inspection from the deck itself.

Q Standing more than 15 feet away from it?

A Sixteen feet high and about eight feet back.

Q But you would generally look to see if it was attached, that it was not for any reason unsecured, is that right?

A That's correct. As long as it was working, it was fine.

Q Did you have any reason during the time you were there working for Hawaiian Marine Lines have any reason to inspect or to touch any of the turnbuckles on the door of the Oahu for any reason?

A No, I did not.

MR. ESTES: Objection. That's a compound question, if he had an opportunity to inspect or touch.

MR. JIM ON: Okay. I'll use inspect.

MR. ESTES: That has been asked and answered.

THE COURT: No. He may answer.

Q Please answer the question.

Q Okay. The only times though that you recall that the doors jammed were when the forklift was being used, is that right?

A That's correct.

Q You talked about occasions when you would make visual inspections of the cables and turnbuckles on the door of the barge Oahu when it came into port here in Honolulu. Do you recall talking about that?

A Yes.

Q And in order to do that, it is my understanding that you would stand on the dock and look up at those cables and

turnbuckles on the top of the door, is that right?

A I would stand on the deck.

Q I'm sorry. The deck.

A Yes.

Q Okay. Now, I take it you could see the turnbuckles and cables from the deck.

A Yes.

Q Okay. When you were inspecting those turnbuckles and cables, what were you looking for?

A To make sure the threads were inside the open area.

THE COURT: The threads?

THE WITNESS: The threads, yes.

Q When you say the threads are inside the open area, when I look at the turnbuckle, I look at the barrel of the turn.

buckle, which is that open area. Let's refer to that as the barrel, and there are two bolts that come in to either end of the barrel, is that right?

A Yes.

Q Now, when you say you're checking the threads on the inside, are you saying that you're checking to make sure that the bolts are threaded into the turnbuckle so that you can see them on the inside of the barrel of the turnbuckle?

A That's correct.

Q Now, did you ever have occasion when you checked, when you visually inspected the turnbuckles on the top of the door of the barge Oahu, when you noticed that the bolts were not threaded such that you could see the bolt on the inside of the barrel of the turnbuckle?

A Could you rephrase that?

Q Sure. When you inspected the turnbuckles--let's limit it to the turnbuckles--was there ever an occasion when you were not satisfied that the turnbuckle was properly attached?

A No, there was not an occasion.

Q Okay. What was the purpose for your inspecting the turnbuckles and cables?

A What was my purpose?

Q Yes. Why were you doing that?

A I'm just visually inspecting to make sure. Actually the doors, when the doors were working properly, there was

no need to really inspect it thoroughly.

Q When you say thoroughly, what do you mean by that?

A I did not only inspect vessels. This is just a minute part of it. I looked at

the cables to see if it was frayed, so...

Q Would you check the rollers to make sure that the cable was on the rollers and that sort of thing?

A No. As long as the door started opening, then the rollers were okay.

Q Why were you checking the cables and turnbuckles?

A Just to find out if there were any frayed wires or anything.

Q Okay. And why are you checking the turnbuckles?

A For the thread.

Q Now, would one of the purposes for your inspection be to fill out that barge condition report that you earlier referred to?

A No.

Q Okay. If you had seen the problem of, say, frayed wires or a turnbuckle maladjusted or something like that, would

that be a subject that would go into your barge report?

A That's correct.

Q Did you ever recall putting something like that in a barge condition report?

A I can't recall.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

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a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME III OF VII VOLUMES

PAGES 307-440

DATE: May 28, 1986

to you to be used when you're working at heights, when you have to work above a certain height level?

A There are safety belts that we have but I don't recall if there was any available at that particular pier during the operation that night.

Q What criteria or what heights do you usually have your men wear safety belts?

A I would say roughly about two containers high which is roughly about 16 to 17 feet.

Q How high was the top of this cargo door? Do you recall?

A The height of the door, I don't know the exact height but I would say in the vicinity of 13 to 16 feet.

Q And where the cables are at the very top, do you recall about how high that was?

A Can you show me on the diagram where you're referring to?

Q The cable that you pointed to that you grabbed, the highest cable, how high is that?

A Well, like I say, I don't know the real height, so I estimate it between 13 and 16 feet.

Q Okay. Why didn't you get a safety belt on the night of the accident to use? Any reason?

A No. Like I said earlier, when I first started there as a stevedore, the practice was to climb up the doors without any safety belt to unloosen the locks so that we can open the doors, and that was the practice and we were taught that way

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VOLUME IV OF VII VOLUMES

PAGES 441-607

DATE: May 29, 1986

Q That's still part of your stevedoring operation.

A That is still part of the stevedoring operation.

Q Okay. So, in terms of the stevedoring operations, after the barge house door is closed and secured, then the next step would be to clear the ramp way area, is that correct?

A That is correct, sir.

Q And what else before you secure your portion of the stevedoring operation?

A Well, put all our equipment away.

Q Your equipment.

A Our equipment.

Q The forklift and all the equipment that Castle and Cooke was using.

A That is correct, sir.

Q And all during this time Castle and Cooke is billing an hourly rate to the

vessel owner, is that true?

A I beg your pardon, sir?

Q During this time... . This is the time you people are billing for your time to the vessel owner, isn't that true?

A As far as checking and putting away the equipment, you know, it's part of the operation.

Q Do you have time cards?

A Time sheets?

Q Yes.

A Do I have a... .

THE COURT: When you were working there, did you have to have a time card for each man?

THE WITNESS: We don't have a time card, your Honor. We have a blank form we call time sheets, and whoever is in charge of the gang and added men to his

gang, they always keep track of how many men they have and what are they doing from this hour to this hour. They all put it down on this time sheet. Likewise for the machine operator, what equipment he is using and what he is doing with that particular equipment that he is using. But, as far as time cards, where you punch in and you punch out, we don't have that.

Q In respect to the time sheets, does the time sheet that you are referring to on the night of the accident, would it include time to remove the ramps and put away all the machinery?

A That is correct, sir.

Q And the time sheet would also include the operation you're working on, that is, what vessel you're loading and unloading, isn't that true?

A It has the vessel you're working on,

at what respective pier you're working at, you're loading back containers or general cargo, or discharge, all of those things.

Q Do you bill all the time to the vessel Oahu, for example, from the time you secure the barge house door, all the way through the time you put away your equipment?

A That is correct, sir.

Q And at what point does the time stop against the charges against the barge Oahu? Would it stop when everybody is off the barge and off the pier?

A This is correct, sir.

Q Okay. Let me make sure I understand. Stevedoring operations that was being billed for time, it starts when the vessel comes on to the pier and

Castle and Cooke people go aboard the vessel, is that right?

A It starts from the time we start the operation, that is correct, sir.

Q What triggers the commencement of the operation? Isn't it the opening of the ramp way going on to the barge, or is it from the time the barge comes in?

A Not necessarily, sir.

Q What usually triggers the start of the operation?

A It all depends on the load, how heavy the load is on the barge.

THE COURT: He's asking you when do you start keeping the time.

THE WITNESS: The time, sir, when these barges or any vessels come to the port of Hawaii, they notify our company what time they want our men to start to work on that particular vessel. So the night before we had the assignment that

tomorrow we'll start this particular vessel, normally

now over here on top as depicted in this exhibit?

A Yes, I do.

Q Do you see it?

A Yes, I do.

Q Do the positions of the cables, do they accurately depict the position of the cable as they were on the barge house on the Oahu on December 1980?

MR. ESTES: I'm going to object, your Honor. Lack of foundation. He hasn't even said he saw the barge at that time. He said he was the general manager but he didn't indicate he had anything to do with the barge operation.

MR. JIM ON: I can ask him.

Q Did you see the barge in 1980?

A Yes, I did.

Q How many times? Numerous times?

A Yes.

THE COURT: Go ahead and answer the question. Was it accurate, to your recollection?

THE WITNESS: Not exactly.

Q Could you explain?

A Well, the pulleys were actually higher up and the cables were higher up above the doors themselves and they were sort of recessed above the doors because, if they were like that, there was an opportunity for them to get tangled, so we had them actually higher up and somewhat recessed.

Q As far as the maintenance, inspection, repair of the barge and its equipment, that was the responsibility of

Marlin Pulliam, correct?

A Yes, it was.

Q Mr. Pulliam testified in his deposition, Mr. Stiger, that, as operations manager, he had a custom and practice of inspecting the equipment on the barge Oahu every time it came in to Honolulu. Was that your observation and understanding?

A Well, that's what I used to so, so you, know, when he came to Honolulu in that position, he simply carried on the duties that I had previously performed, yes.

Q And he also said that, as part of his inspection, he would inspect the cables, the bolts, the turnbuckles, the rigging system on the cargo doors. Did you ever do that when you were with HML?

A I believe that I did that on a sort of routine basis. I don't recall

specifically but it was sort of a habit thing that one did.

Q On the voyage of the barge Oahu when it arrived in Hawaii, December 22nd, was it...

A Yes.

Q ...at that time Marlin Pulliam was on vacation, is that correct?

A Yes. The records indicate that he was on vacation.

Q And I think he testified that he was in Portland at that

time.

A Yes. He was vacationing with his wife and family.

Q Would you know who took Marlin Pulliam's place on that voyage to do the inspection?

A Well, that responsibility fell back

on my shoulders to fill in for him while he was on vacation.

Q Did you do it?

A I don't specifically recall doing that particular function, but, past practices, that would have been an obvious duty that I would have performed, but that's a long time ago.

Q But you don't have any specific recollection that you did it in place of Marlin Pulliam on that particular voyage.

A No, sir, I do not.

Q Do you know if anybody else was assigned to do it?

A No. There would not have been anyone else.

Q What about Fran Yuen?

A No. I don't believe he would have done that as a routine part of his duties.

Q Was there anybody else that was trained to do the inspection that Marlin

Pulliam usually did as operations manager?

A Just myself.

Q During the year 1980, do you have any specific recollection that you performed any inspection of this nature in place of Marlin Pulliam?

A The only time that I would have done this as a normal

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TRANSCRIPT OF PROCEEDINGS

VOLUME V OF VII VOLUMES

PAGES 608-733

DATE: May 30, 1986

Q What is Pacific Marine Lines specifically?

A It's a marine transportation company. Actually we're starting up this service. My employment started February 18 of this year, 1986.

Q And is this a company similar to Hawaiian Marine Lines?

A Yes, on a smaller scale..

Q Let me go back. You were working for Hawaiian Marine Lines in 1980, is that correct?

A Yes.

Q What were your functions... . Let me back up. What were your duties and functions for Hawaiian Marine Lines in 1980?

A Sales representative, marketing and sales, and also assist in operations at a later time.

Q How long were you working for Hawaiian Marine Lines?

A Approximately two years.

Q And in terms of sales and marketing, what would you do for Hawaiian Marine Lines?

A We generate new accounts for shipping and container loads, shipping out of the West Coast to Honolulu and back from Honolulu to the West Coast, and service existing accounts.

Q Who was your supervisor at that time?

A Immediate supervisor was Fred Muira.

Q And above him?

A Donald Stiger.

Q Why is it necessary for you to do that when it is being reloaded for sailing?

A Well, to insure that the load plan is

followed for one thing; and, if there is any damage to any cargo that is going to be set on the barge, any damage by stevedores or anyone, accountability of all cargo being shipped back, and to see that the operations go smoothly because we are representing Hawaiian Marine Lines.

Q Okay. Now, what do you recall about the accident that Mr. Kong was involved in?

A Well, I was on the barge Oahu.

Q Let me stop you there. About what time did this accident occur?

A It occurred probably around 1:00 a.m., between 1:00 and 2:00 a.m.

Q That's December 24.

A December 24.

Q And can you tell the judge what the overall climate and the lighting conditions were at that time just before the accident?

A Well, first of all, everybody was tired. It was still dark. There was still a lot of work to be done. I guess it was nearing the end of the shift itself. It was drizzling. It was not very lighted. You have your normal operations with portable lamps, and the lighting was somewhat assisted

certain barge.

Q Supervisors belonging to who?

A Castle and Cooke. Castle and Cooke people have that responsibility.

MR. KIDANI: Thank you, Mr. Yuen. I don't have any further questions.

THE COURT: Mr. Nagle.

MR. NAGLE: Yes, your Honor. Your Honor, may I have just a moment, please?

THE COURT: Surely.

CROSS EXAMINATION

BY MR. NAGLE:

Q Good morning, Mr. Yuen.

A Good morning.

Q It is my understanding that you were with HML for the period 1979-1980, is that correct?

A Yes.

Q During that whole period of time, were you a sales rep also?

A When you say the whole period, sir, yes, and added duties in operations.

Q Okay. As you mentioned, later.

A Yes.

Q And when did the added duties come on?

A I'm not exactly sure when. It could be several months

prior to December. I'm not exactly sure, sir.

Q And would it be fair to say that, even with the added duties during the period that you had the added duties, most of your time would be spent as a sales rep?

A Yes.

Q And did you have any background of training prior to coming to Hawaiian Marine Lines concerning how the barges work and what you should do on the barge?

A No.

Q Was your prior background in sales before coming to Hawaiian Marine Lines?

A Yes.

Q Would it be fair to say that you're not totally familiar with the operations of the maintenance on the barge?

A Yes.

Q Did you have any training from Hawaiian Marine Lines as far as what the required maintenance is on the barge?

A I would say no.

Q During the period of time that you worked with Hawaiian Marine Lines, would it have been your experience that during the times when the barges were loaded and unloaded generally there would be a HML representative present?

A Yes.

Q And ordinarily this would be the operations manager, is that right?

time?

A Yes.

Q With reference to exhibit number 1, could you show the Court where this snag or loop in the cable was when you saw it just prior to the accident?

A My best recollection is that the loop was here in this section here.

MR. NAGLE: Okay. May the record

reflect that Mr. Yuen is referring to the port side of the port door.

Q And I ask you, Mr. Yuen, with the aid of this red marker, if you would put in on the port door where the loop was.

(Witness complied)

MR. NAGLE: And the record should reflect that Mr. Yuen has done so. Thank you, Mr. Yuen. You can return to your seat.

Q And that loop was visible from where you were twenty-five to thirty feet away.

A Yes.

Q Did you see any other problems with the cable?

A Not to my knowledge, sir.

Q Is it your understanding that HML has control of the equipment on the barges that the stevedores do not run?

A Have control of the equipment? That's all part of the barge.

Q And HML is the company that inspects the equipment on

the barge?

A As far as I know, yes.

Q When Mr. Kong... . You said suddenly someone started shimmying up the batten boards. You said initially you didn't recognize it being Mr. Kong.

A No, because it was dark and the cable was defined.

Q Why was the cable defined?

A On these doors, the cable itself, it is quite common to see some sort of a loop there, not necessarily as drooping as what I'm showing, but it is evident that you can always see some kind of loop. Maybe the winch doesn't work. I don't know.

Q Every time that you have gone there

it is common to see some kind of loop on the cable?

A Yes and no, you know. I mean we're not always looking at the cables, you know.

Q But that's one of the jobs when you go down there, right?

A Yeah.

Q You take a look at the cables, right?

A Look at the cables, yeah.

Q So when you go down and look at the cable on the barge Oahu, what you usually see is a loop.

Q When the door is open, yes.

Q Aside from when the door is open.

A I can't recall.

by this particular occasion, what he is referring to.

Q At this time when the barge Oahu came

in to Honolulu Harbor from the 22nd to the 24th when you would handle Mr. Pulliam's usual job, did you inspect the cable system?

A I can't recall.

Q On this time when the barge came in to Honolulu, the time that I just mentioned to you, did you inspect the turnbuckle system?

A I don't believe I did, sir, because the doors were already open and there was no need for an inspection by myself.

Q Do you know if anybody inspected the system when the barge came in?

A I don't know that for a fact.

Q Is it the usual procedure for someone from HML to inspect the cable system and the turnbuckle system?

A I would assume so.

Q That's what you were taught.

A Yes.

Q Mr. Yuen, when you reattached the cable, you said you went up by means of a forklift, is that right?

A Yes.

Q And you were standing on a pallet, is that right?

A That's correct.

Q Did you have a safety belt at that time?

A I beg your pardon?

A. No. We have seen, not necessarily on this occasion, people go up there, but we had no objection. It's in the line of their duty, if they have to go up, they do it.

Q So it's in the line of the stevedores' duty to go up the batten boards and this is nothing unusual that you saw.

A Not necessarily, no.

Q Is that right what I just said?

A I mean, when I heard some commotion, I thought there was something going on so I just turned. I guess I turned; I looked at it, and someone was pulling a cable, yanking on a cable, and someone falling.

Q Okay. Did you take any steps toward the cable to try and see what the problem was with the system?

A No, I don't believe so.

Q Were you ever aware of the cable jamming prior to this particular accident?

A Not the cable jammed prior to this accident. On this same date?

Q No. At any time prior to the accident.

A Yes. There have been occasions.

Q And what was the usual procedure?

A They worked it out either with the

winch or with the forklift.

Q And, if you couldn't work it out with the winch or the forklift, then what?

A Then someone would go up and try to untangle it or try and find out if it was still on the runners, or try to free it from the entanglement or twisting or what have you.

Q Is that what Marlin Pulliam told you to do?

A No.

Q Did you ever undog the bolts on the door?

A I may have certain times.

Q And how would you... . Strike that. Were all of the bolts at arm's length from the dock?

A Not necessarily, no.

Q How would you go up there and undog

the bolts?

A With batten boards.

MR NAGLE: May I have just a moment, your Honor.

Q Mr. Yuen, at any time did you see any lock wires on the turnbuckle that you reattached?

A No. I don't recall seeing any lock wire.

Q Was there any canvas wrapping?

A No, sir. I don't recall that either.

Q Do you remember previously talking to an investigator by the name of Stu Hilt?

A Yes.

Q And you talked to him approximately in February of 1984, is that right?

A I guess so.

Q Did you ever tell Mr. Hilt that you didn't see the

THE WITNESS: John Lanagan, L-a-n-a-g-an. I reside at 2114 North Bryant Street, Portland 97207.

DIRECT EXAMINATION

BY MR. JIM ON:

Q Mr. Lanagan, could you please state your present occupation?

A I'm retired.

Q Prior to being retired, what did you do?

A I was superintendant operations manager for Hawaiian Marine Lines, Portland?

Q How long were you the cargo supervisor for Hawaiian Marine Lines in Portland?

A For about ten years.

Q So you were the cargo supervisor for Hawaiian Marine Lines at the time of Donald Kong's accident, which has been

testified occurred on December 24, 1980, is that right?

A Right.

Q Describe your responsibilities and duties as a cargo supervisor, please.

A What I do as a cargo supervisor is I arrange for the cargo to come across the Portland docks. I arrange and draw the cargo plan for the barge. I order the longshoremen. I supervise the loading of the cargo to the barge or the off-loading of cargo off the barge.

Q Now, you mentioned only Portland. You didn't go to other

areas, right? You were specifically the supervisor for the Portland area.

A You can be called to go to other areas.

Q In this case, we're talking about the

barge Oahu. Are you familier with that particular barge?

A Yes, I am.

Q Now, during November and December--I just want to clarify one point with respect to the voyages of the barge Oahu during that time period--you are familiar with the voyage scuedule of the barge Oahu during that time period November-December of 1980, right?

A Yes

Q During November-December of 1980, could you explain to the Court what was the route in terms of where the barge went and where it ended up and where it returned. Say, for example, take November. It has already been testified that it was voyage number 92.

A It was a Hawaiian voyage. We would load in Portland. The vessel would then go up Columbia River, pass Astoria, and

to Hawaii, unload, load, and come back to Astoria and then to Portland.

Q I want to clarify one thing. Is Seattle involved in any way? Does anything go to Seattle?

A Seattle is involved in this but on another barge.

Q But, as far as the Oahu is concerned, the operations of

A By that I mean the bolt.

Q Did you ever make that statement?

A I assume I did if you're reading that.

Q Will you look at page 14, lines 8 to 11.

THE COURT: Didn't he just say he said it?

MR. NAGLE: Fine. It's in the deposition. I wanted to show him the deposition.

THE COURT: You just read him the question.

Q Is that the testimony that you gave us in the deposition?

A Yes, and it is mixed up between bolting and unbolting and sliding the doors. Now, when I tell my man to open the doors, I tell them take the bolts off; and then you get into the second operation and you tell the stevedore to slide the doors.

Q Do you remember seeing canvas on the turnbuckle at any time?

A Not that I can recall.

Q Do you remember seeing lock wires on the turnbuckle?

A I have not come across any lock wires.

Q And you know Mr. Pulliam, don't you?

A Yes.

Q You met him back in 1975, is that correct?

A Or thereabouts.

Q And Mr. Pulliam worked with you in Portland before he came to Honolulu.

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TRANSCRIPT OF PROCEEDINGS

VOLUME VI OF VII VOLUMES

PAGES 734-851

DATE: June 3, 1986

MR. KIDANI: Your Honor, may we submit our memo in opposition?

THE COURT: I have the memo. I'm going to reserve ruling on it. I think I need to do some checking.

MR. NAGLE: Fine. Thank you. May I proceed, your Honor?

THE COURT: Go ahead.

CROSS EXAMINATION (contd)

BY MR. NAGLE:

Q Mr. Wong, one of the opinions that you came up with in this particular matter was that the turnbuckle was improperly assembled, is that right?

A Yes.

Q Would you tell us what the basis of that opinion was, sir?

A That was based on the lack of safety wire, or lock wire, in lieu of the existing jam nut.

Q And was it the standard in the industry to have a lock wire on the turnbuckle?

A It was standard for pipefitters and riggers.

Q And where did you get the information that this was standard for pipefitters and riggers?

A I think exhibit 27 shows the rigging manual, and that's where it came from.

Q And when you were putting together your opinion as far

as the fact that the turnbuckle was improperly assembled, you relied upon plaintiff's exhibit 27 in reaching that conclusion, is that right?

A Yes.

Q And did you also come to a conclusion that a jam nut should not have been used

on the turnbuckle?

A Yes, I did.

Q And why is that, sir?

A Because a jam nut is not the ideal way to prevent rotation. It only prevents rotation in one basis direction.

THE COURT: Excuse me. It only prevents rotation what?

THE WITNESS: In one direction.

A And the other thing also is that it presents high stress, high residual stresses, when it is tightened.

Q And where did you get that information that the jam nut should not have been used on the turnbuckle?

A That's my opinion based on mechanical engineering analysis.

Q Is it also based in part on exhibit 27?

A Yes. It is also based on that. My opinion precluded the finding of this

manual.

Q What's the effect of having a jam nut on the turnbuckle?

A I think I just stated that.

Q Let me go back.

A Maybe I misunderstood your question.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

CIVIL NO. 82-0176

DONALD L. KONG and MAY S. KONG,

Plaintiffs,

vs.

HAWAIIAN MARINE LINES, INC.,

a Delaware corporation; et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

VOLUME VII OF VII VOLUMES

PAGES 851-End

DATE: June 4, 1986

I, Dianna W. Orndoff, Certified Shorthand Reporter, Honolulu, Hawaii, do hereby certify that the foregoing is a true and correct transcript of proceedings in Civil No. 82-0176, DONALD L. KONG, et al. vs HAWAIIAN MARINE LINES, INC., held in the United States District Court of Hawaii, Honolulu, Hawaii on May 22-23, 28-30, June 3 and 4, 1986, before the Honorable Charles L. Hardy, Judge.

September 2, 1986

/s/Dianna W. Orndoff CSR #170

No._____

In the Supreme Court of the
United States

October Term, 1987

DONALD L. KONG; MAY S. KONG

Petitioners,

vs.

HAWAIIAN MARINE LINES, INC., a
Delaware corporation;
WILLAMETTE IRON AND STEEL COMPANY;
GUY F. ATKINSON COMPANY,

Respondents.

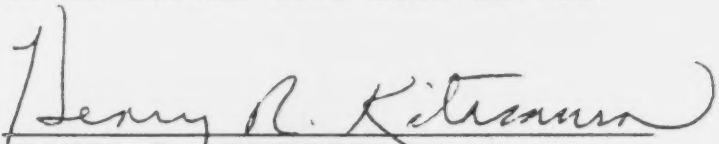
CERTIFICATE OF SERVICE

I, Henry N. Kitamura, a member of the Bar of this Court, hereby certify that on this 21st day of October, 1987 three copies of the Petition for Writ of Certiorari in the above entitled case were served by personal delivery upon the following at the address shown below:

GRANT K. KIDANI
300 Stanford Court
233 Merchant Street
Honolulu, Hawaii 96813
Attorneys for
HAWAIIAN MARINE LINES,INC.

JAMES T. ESTES, JR.
3100 Mauka Tower
Grosvenor Center
737 Bishop Street
Honolulu, Hawaii 96813
Attorney for
WILLAMETTE IRON & STEEL CO.
and GUY F. ATKINSON CO.

I further certify that all parties required to be served have been served.



WALTER S. KIRIMITSU
HENRY N. KITAMURA

SHIM, TAM, KIRIMITSU, KITAMURA
& CHANG
333 Queen Street, Suite 900
Honolulu, Hawaii 96813
(808)524-5803

Counsel for Petitioners